No. 20822

In the

United States Court of Appeals For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA
a corporation

Appellant,

vs.

THOMAS J. THOMPSON,

Appellee.

Appeal from the United States District Court
for the District of Idaho
Southern Division

REPLY BRIEF OF APPELLANT

RICHARDS, HAGA & EBERLE
711½ Bannock St.
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The reply brief of appellant will discuss first the inaccurate statements of fact in appelle's brief, and then reply to the questions of law and the argument raised by appellee's brief.

I FACTUAL ISSUES

Either directly, or by implication, certain portions of the appelle's brief are in error. On Page 2, it is stated that the appellant insured the appellee for a full year, throught September 1, 1964. The policy was is-

sued for a full year, to Morrison-Knudsen Company, Inc., and its affiliates, but it is uncontradicted in the evidence that the insurance application of the appellee was effective September 1, 1963, and expired October 31, 1963. The premium was paid for two months only and no coverage existed after said expiration date.

Appellee on Page 4 of his brief states that appellee was "accepted by the company as being physically fit for heavy construction work." Appellee cites no folio for such statement, and in fact it is not correct. No employment official of the company appeared, the only witness being the manager of the accounting department. Further, there is no evidence in the record of what the standards which had been established by said company for overseas duty as to physical fitness may be. Finally, objection was certainly made to Exhibit 20, allegedly a medical report, in which the doctor made certain statements wholly unrelated to an examination, but being conclusory in nature. There was no evidence that this particular doctor made the examination for Morrison-Knudsen or as an independent physician, of whether he knew where the appellee might be going overseas which certainly would affect his ability to judge whether he was physically fit, nor was there any evidence of whether the company acted on the basis of the medical report. Further it was made in the summer of 1962, prior to two other accidents which occurred before the September 1963 accident. As is very carefully set forth in appellant's brief, the medical report, Exhibit 20, was improperly admitted into evidence over objection and was highly prejudicial. This is discussed further below.

Somewhat amazingly, appellee not only misstates the nature of the cervical injury and surgical correc-

tion thereof, but never answers the point raised by appellant's brief on this. Thus, on Page 5 of appellee's brief it is stated that the operation performed on appelle was for "correction or improvement of the cervical disc protrusion." A major point made by appellant was that there was a hard, bony, and therefore very old, cervical disc protrusion at C-7 level, as well as evidence of one at the C-6 level. The second point made was the existence of well defined osteophytes in the area of the C-7 and elsewhere in the cervical spine. Even though Dr. Burton, appellee's expert, both in his presurgery and his post-surgery diagnosis, and the proof of loss to appellant, claimed a broken spinus process and a ruptured cervical disc that had been removed, both appellee's orthopedic surgeon witness and all the doctors for the appellant contradicted him. In fact, the operation found nothing broken and was merely a removal of the posterior section of the lamina in the C-7 area, so that the difficulty being created by the very old, hard, protruding disc impinging against the old osteophyte areas of the lamina no longer irritated the nerve root. There was no correction of the disc for very sound, and uncontested diagnostic reasons given at the trial. The uncontradicted evidence was that while the Septem 9 fall irritated the existing condition of the cervical spine, but for the existence of the preexisting protruding discs and osteophytes, the irritation and pain from the fall would have been transient. The evidence was uncontradicted that the nature of the hard disc and the osteophyte was such that their development had occurred over a number of years. It is clear that these were not minor conditions or conditions of a normal person of the age of appellee, and that they are conditions that would continue to develop and cause irrita-

tion. Therefore, it is amazing that appellee does not explain how the alleged disability could arise from the September accident in light of these obvious preexisting infirmities and be within the policy's terms which exclude them.

Likewise, on Page 5 of the brief, the last major paragraph, it is startling to find appellee avoiding the basic issue of the case with his statement that at the time the policy was issued appellee was fully capable of performing the duties of his occupation. An examination of the folios cited shows only the bare statement by the appellee that although his hands were tender from burns of the May accident requiring the wearing of gloves that he ". . . was able to do (his) job." (TR 34). There is no other statement as to being fully capable of doing his duties. Of course, the facts shown elsewhere in the record, and cited by appellant in the description of the various accidents that occurred to him prior to the September accident, clearly show to the contrary. Briefly, these were a major impairment of his hearing which made heavy construction work hazardous, a major pulmonary disability from the May fire which even prior to the September accident was causing him shortness of breath in any minor distance walked, his inabilities to bend over and touch much below his knees, and the various internal conditions as previously noted. In any event, the question is not whether at a point in August 1963, he was able to do certain work, but whether as a result of the accident of September 1963 he is unable to do any work (as distinguished from what he had been doing) within his knowledge and training. Certainly the statement in the brief is a misstatement of the actual evidence.

In the same area on Page 5, in the last two lines, it

is stated, without citation of folio, that appellee now "was not qualified for any employment that didn't involve a great deal of physical effort." This is erroneous, as the proof of appellee is not to this effect. The evidence is uncontradicted that the appellee had progressed through many menial physical labor jobs to jobs in which he was a salaried employee of a major corporation receiving substantial pay with commensurate responsibility. This is shown by the various responsible supervisory positions held, and while certainly they were not desk jobs, neither were they menial labor jobs. Appellee fails in his proof on this point because it is clear that he is able to read, write, handle normal reports of work completed, men employed, accidents happening, holds a drivers license and can drive a car, and can instruct men on how to use heavy construction equipment. The proof is uncontradicted that appellee made no effort to obtain jobs along this line of experience, the only job he sought to hold after the September 1963 event being that of sweeping.

On Page 6 of appellee's statement of facts he lists the disability which he claims prevent him from working. These are simply unable to be on his feet except for short period, unable to sit for long times, nervous and shakey. Appellant would somewhat subscribe to this list, in that the cervical operation eliminated any headaches, left only a very minor disability in the neck and shoulder in the way of discomfort, and left a very minor lack of feeling in a little bit of the left forearm and three of the left hand fingers. This means that the disability he presently complains of is primarily related to and occurred only after the event of February 21, 1964, when he stepped out of bed and felt a sudden pain is his lower extremities. Except for the shortness

of breath, hearing loss and back fusion, it is uncontradicted that these items arising at the February incident did not exist prior to the February incident. The present disabilities, then being completely unrelated to the cervical accident, and relating wholly to the alleged accident of stepping out of bed, appellee by claiming only these disabilities in effect admits a substantial new cause has entered and occurred at a period outside of the insurance policy.

Appellee's dilemma is made clear in relation to these facts on Page 24 and 25 of his brief, where an attempt to relate the necessary diagnostic myelographic study to the subsequent disability is set forth, alleging that the effects of the opaque dye is the point tying the two together. This must fail, for appellant has already cited in its brief in detail that both appellee's expert Dr. Shaw and all of the doctors testifying for appellant agree that arachnoiditis cannot be determined to be the cause of the lower extremities problem. Appellee is committed to this position by his own expert Dr. Shaw, and certainly the clear evidence provided by those who were an expert in the field is to that effect. Dr. John Raaf is shown by the testimony (TR 338-340) to be one of the outstanding neuro surgeons of the West Coast, and Dr. Edward Keifer, in addition to being the actual surgeon in the case, is shown to be a highly qualified neuro surgeon belonging to nationally known and highly selective organizations in his field (TR 289-90). Appellee does not answer the points raised in the appellant's brief that in fact he is bound by the statement of his own medical expert, Dr. Manley Shaw, a well qualified orthopedic surgeon, that very likely the pain that arose on stepping out of bed was from irritation to nerve root

probably caused by scar formation arising probably from the previous fusion operation. Appellant's brief 26-27. Recalling that all of the doctors agree that any inflammation which could have occurred in the spine and resulted in scar tissue, which might have caused the disabilities in the lower extremities, would have required a considerable period of time, the fact that this pain arose instantaneously on stepping out of bed, and within a few hours after the myelogram, clearly points to the reason the doctors would not relate it to the myelogram. Where the medical records show no increase in the level of the temperature, pulse or respiration indicating any inflammation, and the symptoms alleged to have occurred, and claimed to exist to the present time, occurred within a few hours of the myelogram, it is clear that some other mechanism was involved.

Thus appellee has no facts by which to trace causation from the September accident through to the February event. The dye cannot relate the myelogram to the February disability that is now claimed, and a violent result of stepping out of bed is so highly unusual, unexpected, and tragically out of proportion to the event that caused it as to be an accident within its own effectuating circumstances.

Appellee says that cases cited by appellant of unusual circumstances unrelated to the original injury which broke the causation relationship do not apply here. Yet, this is precisely the situation involved. Appelle was the only one present when he got out of bed and has made no explanation of how the sudden pain arose other than he just stepped down. That something happened in the manner this occurred very likely relating to the previous fusion operation and other injuries to him, is no different than if the ceiling fell on

him at that point. The cited cases show this was just as unrelated; it was just as unusual, unexpected, and considerably out of proportion to what he was doing in stepping out of bed as if he were just lying there when it happened, and it did not result directly and independently of all other causes from the original accident of September, 1963.

Other minor misstatements of fact are as follows: On Page 10 of the brief appellee states the proof of loss form was dated September 9, 1964, when in fact it was dated September 8. Further, for appellee to claim he fully complied with the claim provisions of the policy is to evade the facts. As is fully set forth at Page 78 of appellant's brief, there is a failure to prove within the terms of the policy that following the accident a full 365 days had elapsed, after which event he was fully disabled and after which event the loss occurred and a claim could be filed. At least there was an issue of fact which should not have been taken from the jury, which instruction number 11 did. Secondly, it avoids the issue of whether the loss of full and total disability followed the September, or the February, accident. The point raised by appellant was simply that the instruction is erroneous as a jury issue exists. Appellee has not answered this.

On Page 32 of appellee's brief, it is stated the various, previous inconsistent statements that appeared in the pleadings of appellee could not be the basis for questions to appellee for impeaching him, and therefore, the exhibits were "obviously inadmissible." The point referred to is Specification 18 (b) and (c), and the argument thereon, appellant's brief Pages 85-86. Instead of misstating the facts that they were obviously inadmissible, appellee should have distinguished, if he

could, the law cited for the right to impeach a witness by his previous statements appearing in the pleadings he had filed. It stands as error for the Court to have prevented appellant thus impeaching appellee.

Appellee infers on Page 35 of his brief, as to appellant's claim of prejudicial actions of the court, that the appellant failed to take reasonable efforts to object and have the court change his proceedings so as not to make them prejudicial. Certainly the principal cited is correct, but appellee fails in any particular to apply it to the case. He would do well to explain how, as to the dispute over the admissibility of Exhibit 20, the medical report, appellant's counsel could have done anything more. The argument between counsel and the court, in which the court continues his exposition of appellee's position, takes some two pages of the transcript and all objection possible was made. Appellee is absolutely in error when he states at the bottom of Page 35 of his brief that there was no criticism of counsel by the court. A close reading of the portion relating to Exhibit 20 clearly shows that the court was being very specifically critical of the objection raised by counsel and of counsel's persistence in objecting. As even cited by the appellee at Page 30 of his brief, when the court was inquiring about calling the proper officer to identify the exhibit, he used the word "we" as if he were plaintiff's counsel who is being forced to call a proper officer. In the course of this appellant's counsel even had to interrupt the court, who was carrying on the direct examination for the appellee, for the privilege of asking a question in aid of an objection to the question the court was asking. Now it is obvious that after the discussion that appears in the transcript from TR 244 through TR 246 that this was not a mere in-

advertence by the trial court, but that he was well aware of what he was doing. It is interesting to note that appellee does not challenge the statement of appellant at brief, Page 95, that the court's inflexion in making its final rulings in relation to Exhibit 20 were not without considerable emphasis not favorable to appellant.

Certainly appellee is in error at Page 36 of his brief in stating that appellant admits there was no "specific instance" of remarks or conduct prejudicial to appellant. What has been said above clearly shows one very important instance. Further, the specific items set forth in the specification of errors show other instances claimed. While there is, of course, an accumulation of the evidence of the court's feeling in the case, nevertheless, appellant has not admitted that there were not specific instances that were very prejudicial.

II. FURTHER LEGAL ARGUMENT

Appellee raises a number of points that need to be clarified, as well as certain additional cases cited on two major points.

By two devices appellee seeks to avoid the problem presented that the cervical spine injury, and any disability therefrom, was substantially corrected by the cervical spine's surgery. First, he seeks to refer only to the alleged ability of the appellee to do his work prior to the September 1963 accident and the alleged inability to do the work after February 1964 as evidence that the disability arose wholly from the September accident. This is an error in logic, because it ignores the wording of the insurance policy under which claim is made. The injury alleged, not the inability to do the work, must result directly and independently from all

other causes from ". . . injuries caused by accident . . ." Whether the particular injury is the severance of a leg, or a sore neck, it is the item which must be related to the accident, not the loss which may result. Appellee has failed to sustain the proof required that the pre-existing disabilities and infirmaties are not to a large extent the cause of the loss, not the accident.

The second mistake of logic by the appellee is his apparent position that regardless of what happens to an injured person following an insured accident, it is related to the original accident. This in effect requires that you ignore the very clear wording of the insurance policy, that the injuries must be caused directly and independently of other causes by the accident and not from an excluded cause. The applicable law is cited in appellant's brief in the argument section on "The Policy of Accident Insurance" and "Is Appellee's Claim Within the Policy." Appellee seeks to ignore the very material lack of causual relationship of the injury which apparently occurred on stepping out of bed in February. The alleged severe injury to the lower extremities on the minor act of stepping out of bed is a new cause — a new accident — not related by the evidence to the insured September accident.

This brings us to the third error in the appellee's logic, the burden of proof as to the excluded causes under the policy. Appellant treats this commencing at Page 61 of its brief, and appellee notes it under "miscellaneous issues" at Page 37 of his brief. Apellee is in error in claiming that the burden is upon appellant as to proving that the causes of the present condition of appellee falls within the excluded items of the policy. Appellant had cited the 1965 case of Idaho Supreme Court, *Evans vs. Continental Life and Accident Co.*,

supra. This case is in point as to the type of policy involved and the exclusion which included substantially identical terms to that before the court. Appellee cites the *O'Neil vs. New York Life Insurance* case, supra, in Idaho Supreme Court case of 1944.

Thus, the case relied on by appellee is not the law in Idaho as to the particular policy before the court. The recent *Evans* case, because of the extreme care in its writing and the very careful extensive citations given, shows what the Supreme Court of Idaho has specifically held in this situation and clearly shown the applicable law, disregarding any possible application of the older O'Neil case. The O'Neil case may also be distinguished by the fact that it was an accidental death policy with double indemnity provisions and the issue involved was a willfully committed assault or felony. There is a distinction between such defenses in double indemnity cases as suicide or willful assault with the exclusions of typical accident policy. Therefore, the reliance by appellee on *O'Neil* cases is inappropriate.

The same is true of the case of *New York Life Insurance vs. Wilson*, supra, cited by indirection through the ALR annotation noted on appellee's brief Page 38. This is a Circuit Court of Appeals case of 1949, and does not take into consideration the 1965 definitive holding of the Supreme Court of Idaho in the *Evans* case. It can also be distinguished as to the burden of proof question on the fact that it involved a life insurance policy with a double indemnity clause for accidental death resulting from external, violent and accidental means. As the Supreme Court of Idaho noted in the recent *Evans* case, you cannot use comparisons between the very different types of policies because different burden of proof rules apply. Therefore, appellee's position

on Page 39 of his brief that appellant did not meet its burden to show that the disabilities resulting from the September 9 accident were within the exclusions of the policy is in error.

Appellee does not claim that he proved the pre-existing disabilities and the subsequent event of February were without the policy exclusions, as the law shows he would have to in order to recover. All doctors agreed the pre-existing disabilities contributed to the present state of appellee. Further, as the facts set forth in appellant's brief show, the doctors were practically unanimous that the myleogram could not be determined to be the cause of the disabilities that allegedly arose when the appellee stepped out of bed in February 1964. Some thought the pain on stepping out of bed was due to the pre-existing disability of the fusion, and others said that because there was an absence of any significant neurological findings it was wholly conjectural what the actual cause may have been.

Importantly, appellee does not contest that the various results of previous injuries were not diseases or bodily infirmities, but only contends that because appellee could do his work they were immaterial. This is particularly important when it is recalled that Dr. Franklin David, as a witness for appellee diagnosed a 40% pulmonary deficiency, emphysema, chronic bronchitis, and pulmonary fibrosis existing in the appellee. These, of course could not have been caused by the cervical injury, must have developed over a considerable period of time, and specifically after the May 1963 accident had reduced his final capacity to walk more than two or three blocks without shortness of breath. Similarly, the cramping or charley horses in the lower extremities caused by walking a few blocks in the absence

of neurological changes was pretty well determined to be intermittent claudication, spasms of the muscles caused by lack of blood supply. Again there is a failure on the behalf of appellee to tie-in this fact by any chain of causation to the cervical injury of September 1963, either directly or through the event of February, 1964. This is primarily true for the reason that appellee is bound by the testimony of his orthopedic surgeon specialist, Dr. Manley Shaw, that you cannot determine what caused his lower leg disability. Appellant's brief Page 27. Even appellee's witness, Dr. Burton, admitted that without a biopsy of the tissues of the spinal cord he could not tell for certain what the cause might be.

Appellee's brief raise another question, whether the wording of the exclusions in the policy are to be differently interpreted because they do not use the words "directly or indirectly, wholly or in part." It is to be recalled that the exclusion of the policy is a direct one, saying it does not "cover loss caused by or resulting from any one or more of the following." Appellee argues this point at Pages 12-14 of its brief. Appellant would add to the discussion set forth in its brief Page 56-60, the following additional authority.

We must first note the general rule that the construction of an insurance policy most strongly in favor of the insured and against the insurer has no application unless it is first determined there is an ambiguity in the policy. This rule relating to ambiguities has no application to interpretation of clear meaning of policy. *Bergholm vs. Peoria Life Insurance*, 284 US 489, 52 Sup. Ct. 230, 231, 76 L. Ed. 416. As appellee has pointed out no ambiguity in the policy, rule of construction claim is not applicable.

This leaves only the question of the clear meaning

of the policy, which appellee says as to the exclusionary provisions is some way effected because it does not include the additional words "wholly or in part, or directly or indirectly." Thus appellee would interpret the two basic provisions of the policy, that requiring that the injury result directly and independently of all other causes from bodily injuries, and the exclusion that the policy does not insure a loss resulting from illness or bodily infirmity, to mean that the exculsionary provision applies only if the loss is in whole caused by illness or bodily infirmity. This interpretation would in effect read the exclusionary clause out of the policy.

Appellant's specific objection to the instruction given was that it only covered the first test, directly or independently of all other causes, and did not include any instruction on the exclusion provisions. Appellee argues at Page 14 of his brief that it would have confused the jury to include the exclusionary provisions, and it was permissible for the court to reduce the contract to its simple and basic point. This was clearly erroneous.

First, the exclusionary clause is a special clause limiting the general clause and under the rules of construction any conflict between general and special clauses gives preference to the special clause. The cases generally hold that the basic provision of the present policy, that injury must result directly and independently of other causes from the accident, is a sole cause clause, and that the clause that the policy does not insure against a certain type of loss is an exclusionary clause. As pointed out in appellant's brief, Page 55-58, including cases therein which have not been distinguished or attacked by the appellee, the addition of such an exclusionary clause definitely creates a dif-

ferent type of contract. In addition to the requirement that the injury be caused by an accident as the "sole cause," which some courts have held to require only proximate cause, there is the additional exclusion that the same proximate cause cannot include the specifically excluded items working in conjuction with the accident. Appellant ignores the fact that the Idaho Court has recognized this in two cases, *Evans vs. Continental Life and Accident*, supra, and *Rauert vs. Loyalty Protective Insurance Co.*, supra.

Appellant thoroughly discussed the *Evans* case under burden of proof, appellant's brief, Pages 61-62, showing therein a specific discussion of the case cited by the Idaho Court, *Metropolitan Life Insurance Company vs. Rosier*, supra. The cases therein cited show whether the words "wholly or in part, directly or indirectly," are used has not been a distinguishing factor in the application of the exclusionary clause. Because under accident insurance policies, as distinct from life insurance policy, the burden is on the beneficiary to prove a certain type of accident within the limited coverage, as opposed to death from whatever cause, such beneficiary must show he is within the term of the policy and also outside the specific exclusions. If that is the burden of proof, the obvious meaning must be given to the exclusionary policy provisions. This was recognized by the Ninth Circuit Court of Appeals in *U.S. Fidelity and Guaranty Co. vs. Blum*, 270 F. 946, (1921) where the decision refused to recognize a possible concurring cause of the injury under a policy which only had the sole cause clause in it, without the exclusionary clause as to disease or bodily infirmity. The court stated:

"Referring again to the suggestion that death may

have been result of concurring causes, that is, of disease and accident, and therefore not within the terms of the policy, because of the language covering death, 'affected directly and independently of all other causes under such circumstances the inquiry simply resolves itself into one of approximate cause . . .

"Our attention has not been called to any clause in the policy which precludes recovery on the grounds that disease has operated concurrently with 'accidental means' to produce injury or death. This court is not required to search beyond the active, efficient procuring cause . . ." 270 F. at 957.

In both the *Rauert* and the *Evans* case the Idaho Court specifically recognized, by its holding, that the additional exclusionary clause had to be avoided in order that the proximate cause from injury received from accident would allow recovery. An additional example is the case of *Kingsland vs. Metropolitan Life Insurance*, 97 Mont. 558, 37 P. 2d 335, where the case distinguishes the former holding of that court that a mere frail general condition or a tendancy to disease cannot cooperate with an accidental cause to avoid recovery under the sole cause theory, but stating that the addition of the exclusionary clause results in the sole cause clause meaning that any contribution by the pre-existing disease is sufficient to avoid recovery unless the accident in and of itself was sufficient to cause the loss.

In the present case the fact that the exclusionary clause did not use the words "in whole or in part, directly or indirectly" makes no difference. In the first place they are included in the words of the original liability clause, that the loss must result "directly and

independently of all other causes" from injuries caused by accidents, as the loss could not be so direct and independent if it was caused by the excluded items. Secondly, where appellee's orthopedic surgeon expert, Dr. Shaw, specifically stated that the injury to the cervical spine would not have totally disabled the appellee except in conjuction with all of the other items that occurred to him, both before and after the September accident, if total disability exist today it has to be the result of the concurring accident and other conditions. To wit, the other items are a major cause as opposed to a mere minor relationship.

Appellant's witnesses likewise agreed with Dr. Shaw, and appellee is bound by his own expert witness. Thus, in a real sense, if total disability does exist, it is caused by bodily infirmity and pre-existing disease, for it would not exist merely because of the September accident. Certainly appellee is in error to argue that only if the pre-existing infirmity or disease is the entire cause of the loss where an accident is involved would the policy exclusion be effective, such argument containing its own answer.

Appellant's position is simply that the accident without the concurring major pre-existing disabilities would not have resulted in the alleged existing total disability, and that the fact of such a major concurring additional item with the accident clearly excludes it from the coverage of the policy. The jury instruction given by the court leaving out any direction as to the meaning of the exclusionary clause is error, regardless of what the definition of that clause should have been. Without some instruction on this portion of the policy, the jury would not have had the correct case submitted to it.

We would conclude this question as to the nature of the wording of the exclusionary clause of the policy by again citing *Russell vs. Glens Falls Indemnity Company*, supra, that is quoted at Page 57 of appellant's brief, that there is no difference between the inclusion in the exclusionary clause of the words "wholly or in part, directly or indirectly" or the statement without such exact words in creating a contract different from the sole cause contract. Where there is such an exclusion as to bodily infirmity or disease the general clause of the accident policy has to be given additional meaning. The court specifically held in the *Russell* case that it was errored to instruct the jury as to the directly and independently of other causes clause and to omit any instruction on the exclusionary bodily infirmity clause.

Another area that the appellee's brief does not clarify is the point made by appellant that in affect there were two accidents from two separate causes. On Page 24 of his brief he cites the Idaho *Rauert* case to the effect that loss occurring after medical treatment following an accident is within the policy. This case has already been carefully outlined in appellant's brief at Pages 58, 59. The case stands for the principal that where a hernia occurred as a result of an accident, and as a result of the operation to correct it strangulation of the bowel took place due to a pre-existing adhesions from an earlier hernia operation, recovery was allowed because the policy merely excluded loss from injuries if due to disease. The exclusion was not applicable as the particular disability was an "infirmity." The Idaho Court would have denied recovery if the policy contained the additional words of exclusion "from disease." The case, therefore, is con-

trary to appellee's position.

On the other hand, appellee does not distinguish the case of *Wilson vs. New York Life Insurance Company*, supra, cited in appellant's brief in detail at Page 69 under the issue of a second accident. In fact, the analogy is this. The *Wilson* case is a holding that the unusual results of treatment, coughing after an operation, was an accident in itself and the sole proximate cause of the loss. The *Rauert* case is one of disease preceeding an accident in the treatment. In both cases the Idaho law states that the second event is a separate, distinct event which is the accident and the sole proximate cause of the loss. Similarly under Idaho law the event that occurred on appellee stepping out of bed in February had such unusual and unexpected results from such a minor cause as to clearly constitute an accident in itself. In fact, even if the appellee had by the facts been able to show that the event of February was due to irritation created by the dye in the myelogram, the same would have been true. This is so because it is highly unexpected, unusual, and the result was highly exaggerated compared to the cause for the myelographic dye to have the effect alleged. This comes clearly within the *Wilson* and *Rauert* cases as a separate accident occurring at or after treatment the time of the treatment even though an earlier accident had occurred. Because all of the expert witnesses agreed that the reaction, if it came from the myelogram, was highly unexpected and unusual, the treatment becomes a separate and distinct accident in itself; as such it is a cause of the disability alleged which cannot be directly and independently from all other causes from the accident of September 9.

Thus, this court stated in the *Wilson* case that the

coughing which occurred after the operation, and with no apparent relation to the operation itself, causing the thrombosis to break loose, was a

> ". . . untoward mishap in this instance as the inducing and sole proximate cause of the loss." 178 F. 2d at 537

Similarly, what occurred in the lower extremities, and which really is the only basis of the alleged total disability, is similar, unexpected and unexplained mishap unrelated to what occurred, and is inducing and sole proximate cause of the loss wholly apart from the injury of September 9, or the diagnostic myelogram.

Finally, answering the question of whether the appellee is totally disabled within the definitions of the policy, appellee is in error in his position that he only needed to prove he could not do heavy manual construction work in order to recover. It is clear that the policy does not pay for a loss based on disability where, even though the injured person cannot do exactly what he was doing before, he can enter into useful, economically valuable work. For example, under a slightly different policy a young girl trained from the age of four to be a ballerina, and who at the age of eighteen while working at excellent pay in the road show of "My Fair Lady" suffered a knee injury during a performance. Subsequent surgery resulted in her inability to dance. She then took a position as a model and a receptionist, and later as a sales lady, at a very much reduced ability to earn. Recovery under an accident policy for total disability within the training and experience of the injured person was denied, the New York Court stating that the fact the insured was only qualified for one occupation, from which she was ad-

mittedly disabled, did not meet the requirements of total disability, where she was at least qualified ". . . to engage in any of the common forms of employment available to girls of similar age and background."

> "It is sufficient to bar recovery hereunder that the insured can qualify for other employment which, in a clear sense, is remunerative. (Cases cited)" *Tschida vs. Continental Casualty Company*, 246 N.Y. Sup. 2d 72 at 76.

The evidence is absolutely lacking to show that Appellee could not so engage in such occupations that an older man of his experience with some disabilities normally could carry on.

There is little conflict in the medical evidence as to Appellee's condition, such as exists being primarily the statements of Dr. Burton as opposed to all of the other physicians. We would first note that Dr. Burton, while a licensed physician, does not hold the various national medical association position and honor position of a number of the other doctors who testified as experts.

Secondly, we would point out that Dr. Manley Shaw, who is an expert orthopedic surgeon, in testifying for the appellee agrees primarily with the appellant's physicians. We would, therefore, call the court's attention to the general position as to conflicting medical testimony that

> "We, as laymen, have no way of determining which theory of the physicians is correct, but whereas the law places the burden of proof on plaintiff and requires that he make out his case by a preponderance of the evidence, we feel we can not do otherwise than to agree with the District Judge . . .

". . . true, mere numerical numbers of experts are not sufficient for a determination of a decision . . .

"There is, therefore, only the statement of the plaintiff himself, collaborated to some extent by Dr. Fenno, as against the testimony Drs. Landrey, Edrington, Stone and Benville, with the result that there is an overwhelming preponderance of medical testimony unfavorable to the contention of plaintiff. The plaintiff in a compensation case must make his case reasonably certain. (Cases cited)" *McNutt vs. Hughes Construction Company*, 176 So. 2d 315 (Ct. App. La. 1963).

This is substantially the case here. Only Dr. Burton, who made a completely erroneous diagnosis of what the cervical injury was, and who is not an expert in either orthopedics surgery or neuro surgery, is the only doctor who to any extent supports appellee's claim as to the cause of his present disability. He is the only doctor who feels he would have been totally disabled by the September 9 accident in disregarding any other pre-existing or later happening events. All of the other doctors, including appellee's own medical expert, disagree. It is submitted that this matter should not have been sent to the jury on the medical point alone in that there was no preponderance of the evidence of sufficient certainty upon which the jury could have acted favorable to the appellee.It is also submitted that the legal interpretation of the policy by the court below, implicite in his rulings and instructions, was erroneous. These items, together with the specifications of error, form a basis of substantial prejudice to appellant.

Wherefore the appellant respectfully prays that this

matter be reversed by this Honorable Court.

Respectfully submitted,

RICHARDS, HAGA & EBERLE

By_____

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